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MEMORANDUM

AGAINST

THE CHILD MARRIAGE BILL

of Mr. HARI BILAS SARDA.

BY

Rajah Bahadur G. KRISHNAMACHARIAR B.A., B.L.

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IN MEMORY OF
Late Mr. R. Krishnaswami Sastrigal, B. A.,
Retd. Sub Registrar.
PRESENTED BY
his beloved and dutiful brother
R. Gopalaswami Sastrigal.

MEMORANDUM.

LAWS relating to such subjects as marriage have their root in the whole history of a nation. Before striking at that root on the ground that it is all evil, it is absolutely neecssary, it is certainly the part of wisdom in administrators, to find out their purpose and goal. The Hindu Ideal of marriage is deep-rooted in religious sentiment, and is hallowed by very ancient traditions and customs based on religious beliefs. Unlike among other communities or religions, marriage among the Hindus is a sacrament and its character as such is so deep that even death does not obliterate it, while there are authorities which lay down that the sanctity of the marriage bond remains even after death. Fortunately for us it is unnecessary at this late hour to labour this point, for every one who has had anything to do with this subject—even those who in their zeal for social reform would throw the Shastras overboard if they do not support their view, agree that marriage is a sacrament and that among Hindus "marriage and religion are two names for one and the same thing." The supporters of the bill even claim that its provisions are in accordance with the Hindu shastras and that the existing custom is against them. Even those who are not prepared to go the whole length as above, assert that the proposed change in no way affects the higher aspects of the Hindu religion such as the goal laid down in the Upanishads, or the teachings of the Bhagavat Gita, or even the rituals etc., connected with temple worship and kindred

matters thereby admitting in a way that Shastras must be reckoned with. All of them unanimously contend however that if the Hindu Shastras really prohibited marriages such as those provided for in the bill, they should be altered in the interests of humanity, as indeed the shastras have as they allege, been altered from time to time to suit changing conditions. It is therefore necessary in the first instance to deal as shortly as possible with the real import of calling marriage a sacrament, and to show that every phase of the Hindus' life is so inter-related and dependant on the due performance of the marriage ceremonies that you cannot divide them into water-tight compartments.

2. The Hindu marriage according to the Dharma shastras marks the beginning of the second and perhaps the most onerous of the 4 stages of a Hindu's life, viz., Grihasthasrama. It is called a Samskara (generally translated as sacrament) or a purificatory ceremony the performance of which "removes the taint of seed and womb." It is an obligatory ceremony in the case of girls just as Upanayanam or wearing of the sacred thread is in the case of boys of the three regenerate classes. According to the Vedas the word Patni (wife) means and is intended to connote a woman who with her Pati (husband) would take part in Yagna (sacrifice). Although a Brahmin was entitled to take a wife from any of the 4 castes yet a Brahmin woman alone married according to the shastras would be called a Patni. The very word 'Bharya' meaning wife attaches a religious significance to it and it is laid down in the authorities as follows:—

अत एव भार्याशब्दो यूपाहवनीयादिवदलौकिकाङ्गसंगेन अलौकिक-संस्कारभुक्तस्त्रीवचनः

i. e., the word 'wife' is like the term Yupa (sacrificial post) and Ahavaniya (sacrificial tree) and is applied to the woman who has undergone Alaukika Samskara (purificatory ceremonies by occult rites). According to the Sutras no religious ceremony could be performed and none is complete without the lawfully wedded wife taking equal part in it. Indeed she is an indispensable companion in securing to the Grihastha the four objects in life enjoined as the goal for all Hindus, viz., Dharma, Artha, Kama and Moksha. The temple rites and ceremonies cannot be performed except by a Grihastha as he alone can take the Diksha. Manu says that of all modes of life permitted in the Vedas, the Grihastha (the leading of a family life with a lawfully married wife) is the highest, as it is he who supports those who follow the other three modes. Just as the Ocean is the final resting place of all the rivers so is a Grihastha for all living beings All the Smritis unanimously lay down that he alone is a grihastha who performs the acts laid down in the Vedas such as agnihotra etc., (and in these the wife is an indispensable companion) and not he who owns houses and properties. He is like the root and the Mula Prana (vital breath). If the root is cut the tree dies. The Grihastha therefore should be protected even at some risk, and it is the duty of the King not only to respect him but to protect him.

3. In view of the sanctity attached to the marital relations the Smritis naturally lay down strict injunctions regarding them for the 3 regenerate classes. Their purport put shortly is, that marriageable age commences at 8 and continues up to 10. After that the girl is considered to be one whose menses have appeared. There is some difference of opinion as to whether the marriageable age ends at 10 or extends to 12. But it appears, on a careful study and collation

of the rules and the penalties for their breach, that marriages must be performed before the appearance of the menses, and in any case it must not go beyond the age of 12 in the case of girls. The learned Mover of the Bill began by stating that Manu allows marriages till 3 years after puberty. Unfortunately Manu does not do anything of the sort, and it is a misfortune that those, who claim to reform Hindu society, and to restore it to its pristine purity, should be so ignorant of its provisions. The rule relating to marriages 3 years after puberty applies to girls whose parents or guardians have neglected to give her away in marriage before that period. In other words the parental authority extends till that period, and the girl may select her own husband after that. Such marriages are not sacraments, but would remove the stigma of concubinage from the woman.

4. A perusal of the Assembly debates would show that there is great misapprehension regarding the authoritative nature of the above injunctions. A little research would however show that all the Rishis or Seers who have been recognised as entitled to make Nirnaya (settlement) of the Dharma have unanimously provided as above in unmistakeable terms. These provisions certainly did not originate from the author of *Sheegra Boodh*, which work appears to be a primer intended for the beginner. Before I leave this point it is necessary to observe that throughout this memorandum the word 'marriage' is used in the sense of an irrevocable betrothal followed by all the effects of a valid marriage. The Garbhadhana or consummation i.e., the ceremony which is performed when the girl and the boy live together as man and wife is, treated in the Smritis as a distinct ceremony, and strict rules are laid down for the time of

consummation, the days of approach etc. This comes later, and certainly never before the attainment of puberty. It would perhaps have been unnecessary to stress this point were it not that in the debates it was repeatedly observed that the proper place for a child below 12 is the nursery and not the marriage bed. If in any community the ceremonies referred to above enjoin or even allow consummation before puberty, we agree that it ought to be mercilessly prohibited. Likewise the marriage of children below 8 years is open to objection. It is perfectly true that such marriages are allowed by the Dharma Shastras, and there is evidence that they were followed. Apart from the difference in interpretation of the word 'Nagnika (naked) it will be evident, on a careful perusal of the Shastras, that such marriages are not enjoined in the sense that penalties would attach to their breach. Reading the injunctions together and remembering that the object of a Hindu marriage is to ensure due observance of the Dharma, it is clear that such marriages are provided for, lest the menses appear and make it impossible for lawful marriages to be performed. It seems to me that in these days when the observance of Dharma is not regarded as of any consequence, indeed when it is regarded that the more its non-observance the greater is the credit to a Hindu, there would be absolutely no opposition on the part of anybody if marriages before the age of 8 are prohibited especially as it would not contravene the Shastras.

5. It is singular that the custom of marrying babies is not only in vogue amongst Hindus, Sikhs, Jains and Buddhists, but also among Mahomedans and Christians as is evident from the statistics quoted in the course of the debates. The total of such marriages in the case of Mahomedans is 1574, a fairly large number considering the mar-

riage laws and customs of the Mahomedans. Would it not have been a better course if in these circumstances, our over-zealous reformers instead of abusing the Shastras where they do not revile at them, and trying to achieve so-called advancement by the "hot-house growth manured by legislation" had paused to inquire why this custom prevailed perhaps in less proportion even among communities in no way bound by the shastraic injunctions, and then thought of remedies remembering always that "the healthy growth on a spontaneous basis of social ideals consistently with modern conditions imparting new life and fresh vigour to the social organisation, and resulting in the progressive evolution of a compact and homogeneous whole" is preferable to impatient idealism.

6. It is however contended by some of the supporters of the Bill that the Smritis have no validity, that the only paramount authority is that of the Vedas, that they do not prohibit child marriages but on the contrary there is evidence to show by the prevalence of Svayamvara in Vedic times that they were allowed, and that there would be no transgression of the Hindu ideals by following the Vedic customs, as against the rules laid down in the Smritis which according to them are a bundle of laws, moral precepts, customs and traditions obtaining at the time of their collection by the various Smriti writers. This argument is based on a regrettable misunderstanding of the real position, and on premises not warranted by any treatise or book considered authoritative among the Hindus. The Vedas are admittedly the final authority on all matters connected with the Hindu religion ; while the Mimamsa lays down various methods of proof, it insists that all these methods are of no validity when the result of applying them is in

conflict with the Vedas. The language of the Vedas are so difficult to understand and they themselves are spread over a vast number of sakhas (branches or schools) many of which have been lost. Even in the existing sakhas not all the Dharmas are specifically laid down; some of them have to be worked out from the mantras applicable to them, while as regards others there is a bare mention in the shape of aphorisms. Manu says and every other Smiriti writer agrees with him that the sages visualise the meaning and the purport of the Vedas, and as their language is difficult to understand and they are spread over various schools the smritis were compiled to make the meaning clear. They are authoritative because they have their root in the Vedas. Those who question their authority on supposed logical grounds or revile at them are to be regarded Nastikas and should be excommunicated. The scheme of the Hindu Law is that the Smritis lay down the rules and the rewards or punishments for their ohservance or non-observance and the Grihya Sutras lay down the procedure to be followed in acting according to the injunctions laid down in Smritis, such as the performance of the physical act to be done and the Vedic mantras to be pronounced according to the respective sakhas etc. These latter themselves are binding authorities only in so far as they conform to the Vedas. It is thus clear that the Vedas, the Smritis and the Grihya Sutras form part of one whole. The idea underlying their authoritative nature is that they are consistent with the Vedas. There is thus no warrant for the assumption that these are divided into separate compartments such as Vedic laws or Shastraic Laws each not necessarily in conformity with the other leaving it to the option of any one to follow the one or the other. The Vedas themselves do not contain any injunction about marriages, and the institution of

Svayamvara (self-selection of the husband) when extant was always confined to the Kshatryas. Such a practice never obtained among the Brahmins. Consequently it is to the Smritis that one has to turn for the rules relating to marriages. These Smritis could not be altered as is argued hy the supporters of the Bill. The rule is that as conditions change in each Yuga, the Dharma Shastra Pravartakas i. e., those entitled to formulate the Shastras lay down the rules for each Yuga. These cannot be subsequently changed by any secular or spiritual authority. The parishads who, it is claimed have that authority and have also exercised it, do not exist except in the imagination of the reformers in so far as the right to alter the shastraic rules or injunctions are concerned. Where however the parishads come in is where the Shastras lay down several distinct kinds of punishments or Prayaschittas (expiatory ceremonies). In such cases the parishad is empowered to determine which of the punishments or ceremonies ought to be prescribed. Even so the qualifications of the parishad is laid down in the shastras as follows:—The members should be well versed in the Vedas and should follow the ancient traditions as interpreted by the sages. It is clear therefore that even if the Smritis could be altered, the Legislative Assembly not consisting of members with the above qualifications is certainly not the authority to alter them.

8. It is however argued that as custom could transcend the law, so can the law based on such custom be altered by the Legislature. The custom (called in the Smritis as Sadachar) is not the custom of those who defy the law or the sanctity of the Dharma Shastras, but of those who being learned in the laws follow the injunctions contained in them. Thus it is not any and every custom

that can transcend the law. Reliance has also been placed on the fact that the legislature has actually interfered with the Smriti laws such as Sati and certain rules of inheritance etc. Except in the case of Sati which stands on a peculiar footing, the other changes were made, not because it was thought that the original state of things required reforming as is now argued, but that they were necessitated to bring the law into conformity with the injunctions laid down in the sacred books when correctly interpreted. In fact the charge has been frequently laid at the door of the English Administrators of Hindu Law that they crystallised the Hindu society by insisting on their following the old laws without taking note of the alleged changes in the ideas of society, and thus rendering it impossible to carry out any reforms.

9. The result of the above somewhat lengthened discussion is that the Hindu law relating to marriage is based on the Shastras which in their turn conform to the Vedas, that it is binding on all Hindus who follow the shastraic laws, and that no authority temporal or spiritual could alter them. Consequently and apart from the other considerations submitted below it is *ultra vires* the Indian legislature to enact any law relating to the religion or the rites and usages of any community. It is true that under section 67 (2) of the Government of India Act a Bill of the present nature could be introduced in the Council with the previous sanction of the Governor-General, and on that basis the Council would have jurisdiction and authority to consider and pass it. What, however, I would respectfully point out is, that in the absence of any provision in the Statute itself laying down the circumstances under which the sanction could be given, it is permissible to submit that such sanction should not be

given against certain fundamental rights and privileges. One such is that no Act should be framed in such a manner that any of the diverse interests arising from race, religion, social conditions etc., may unfairly be deprived of the privileges they have hitherto enjoyed. In this case the privilege is that of the Hindu community to follow their religious precepts without being sent to jail or deprived of their property for so doing. The original Bill was purely of a civil nature, and confined its application to the Hindus but as amended by the Select Committee it applies to all communities and is a penal legislation. A question may arise if the original sanction also applied to this fundamentally different piece of legislation. I do not know that these questions are relevant at this particular stage, but mention is made of them only to show that there are such objections and the Hindu community reserves to itself the right to press them, when the time comes, if it does, for the Governor-General to give his assent (section 68 clause 2).

10. We now proceed to submit a few observations on the merits of the Bill. Considerations of space and the occasion for which this memorandum is being written, make it impossible to submit everything that could be urged or even to elaborate the few leading points referred to here. We shall therefore content ourselves by merely stating the heads of our objections with just so much of explanatory remarks as to make our position clear. The Hon'ble mover stated that the primary object of the Bill is to put a stop to child widowhood. Reliance has been placed on general statistics but not those applicable to the Hindus in particular. It is said that statistics can be made to prove anything. Apart from that initial dis-advantage of placing too much faith in statistics and their gene-

rally unreliable nature, the figures show that up to the age of 15 there were 3,17,200 widows in all the communities, those between 10 and 15 alone accounting for 2,32,147. The number of widows between 15 and 20 is about 80,000 more than the total up to 15. If enforced widowhood at 10 is wrong so is it at 15. The proper remedy therefore is to compel all widows to remarry, especially as the census report ascribes the existence of such a large number to the prejudice against widow-remarriage though such remarriages have already been made permissible. Unfortunately there are no figures to show how many of these widows belong to the Hindu community, and of these how many to the Brahmins and the other castes following the Brahminical laws. If these figures are made up, and if from them the number of widows under 8 years of age be deducted (in view of what is stated below regarding marriages of children up to that age) it would probably be found that their number is so infinitismal that even according to the most up-to-date theories of legislation it would be unreasonable to attempt to effect the change at the point of the bayonet as it were. Assuming that the proposed Bill becomes law and every one of those 3,17,000 widows were married at 15, can the legislature provide against their becoming widows within a few days of the marriage? The fact is, widowhood is an incident in all societies and even a fashion, leave alone laws set by the higher classes is followed by the lower. No amount of legislation can put a stop to it.

11. The secondary aim of the Bill is said to be "the removal of the principal impediment to the physical and the mental growth of the youth of both sexes and the chief cause of their premature decay and death." In the whole course of the debates not many re-

levant arguments were addressed nor have facts been quoted in support of the above somewhat startling proposition that child marriage is the impediment referred to. It is an assertion started by some ardent social reformers and relied on by some malicious critics to cry us down, while our leading men without examining the position and finding out the real cause of the alleged evil have rushed in to seek a cross-cut remedy. The Hindu community including the Brahmins had lasted for more than 50 centuries in spite of this alleged pernicious custom, which has been shown above to have its root in the misty past. It has produced some of the most brilliant thinkers in spite of the alleged evil. It is worthy of note and demands an explanation that although child marriages are admittedly confined to a few castes such as Brahmins and Vysias, yet the rest of the Hindu community among whom post-puberty marriage is the rule suffers the same disadvantages as those quoted above. It is equally noteworthy that this 'premature decay and death' has come upon us only within the last 50 years, and that men and women of the preceeding generations, Brahmins and others lived on the average nearly twice the age of the modern educated Hindu. May it not be that this premature decay and death is due to the impact upon old traditional ways adopted after centuries of experience, of modern habits such as the drinking of coffee and tea, the entire up-setting of the hour of meal and work, the stress and struggle for existence due to the absence of all avocations, the ruin of the village life and the consequent shutting out of healthy outdoor life, and the feverish haste with which the towns are over-crowded with the great unemployed? Then again the modern conditions so largely praised have admittedly changed the entire outlook of the Hindu society, their ideals have been forgotten where they are not held up to contempt, and new

and untried methods are taking their place in spite of their producing disastrons results elsewhere. It would have been a real service to the country if the question of premature decay and death be considered with reference to these points as well, and not attributed solely to child marriages without any substantial grounds.

12. In social matters as in others, growth and improvement would be permanent if they were organic. History shows no instance where the physical force of the state was invoked to assist men to penalise others for the fault of their insisting on following ancient customs. Have the reformers made any attempt to instruct the country regarding the evils alleged by them to flow from this custom? Has there been one-tenths of the agitation created by the late Mr. Gokhale in connection with his Elementary Education Bill? It is claimed that they have been doing it for 150 years. We cannot say about the 150 years, but we do know that occasionally meetings were held which a few pro-reformers attended, while the great mass of people including the much-maligned orthodox community were regarded as of no consequence and therefore ignored. As for the large support claimed for the Bill the less said the better.

13. Assuming that the Bill becomes law, are we quite sure that the evils graphically exposed by Judge Ben Lindsay in his book, "The Revolt of Modern Youth" would not come into existence here. Human nature is the same throughout the world, and Judge Lindsay records that 3/4th of the girls in his school attained puberty between 11 and 12, (nearer 11 than 12) and the appalling immorality recorded by him followed in its train. Whether our customs are inhuman, whether they are tyrannical or cruel we have so far adjusted our society as to avoid Varnasankara (the mixing of castes) which

would be the necessary consequence when women go astray. No sensible person would deny the existence of social evils, but the remedy devised should be done with a due sense of proportion. Is it right or fair to disturb and disintegrate Hindu families and create a spirit of revolt among the younger generation for the mere fault of their elders following their traditions and customs based on religion which to them is dearer than life. Supposing some brave men dare the punishment and disobey the law, could it be held the marriage itself is illegal ? *Per contra.* the marriages performed for fear of the penalty imposed by this law being *ab initio* illegal and void according to Hindu Law and the decisions of the courts which are bound to apply in such matters the Hindu Law to the Hindus how could the objection that the issue of such marriages is illegitimate be avoided or met ? We respectfully submit that it would not be just or fair to create confusion in the Hindu community by such ill-advised hasty and objectionable legislation.

14. Lastly it is admitted by the supporters of the Bill that it only affects the Brahmins and some Vysias, while one Hon'ble member would even go the length of claiming that even among these a large section follows the rule attempted to be laid down by the Bill. In their zeal to get through the Bill, they have not even taken the trouble to ascertain what proportion of the community would be really affected by the proposed Act. It is quite clear that they form a very small minority, that have not only not asked for this legislation but are opposed to it very strongly on grounds which would appeal to every reasonable man. What justification, legal or moral have the reformers in thrusting the Act down the throat of such people. The Brahmins have latterly fallen on evil times and are evidently

hunted by a strange fatality. Attempts more or less successful, are being made to hound them out of every avenue in life, latterly even from the sphere which up to now was regarded as their special forte i. e. preisthood and purohitam. The Bill would complete their ruin by making it impossible for them to derive such consolation as they could by the practice of their religion which afforded peace both in life and death to countless generations before them.

15. The above are some of the more important points which the deputation intend to submit for His Excellency's gracious consideration. With his permission and if time permits they would elaborate some of these and would be ready to offer any explanation which may be desired on other points. We cannot sufficiently convey our feelings of gratitude to His Excellency for having found the time amidst his numerous engagements to give us a chance to make our representations.

16. Our final prayer is that the Bill itself may be completely vetoed and opposed by Government at every stage. If that is impossible or undesirable the legislation may be made permissible and the penal clauses omitted. If even this is impossible we request that the Brahmins and the other communities who follow Brahminical customs in regard to marriage and other ceremonies be exempt from the operation of the Act.

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